

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| HEBREW ACADEMY OF LONG BEACH | : | DETERMINATION |
| | : | DTA NO. 818273 |
| for Revision of a Determination or for Refund of Real | : | |
| Estate Transfer Tax under Article 31 of the Tax Law | : | |
| for the Year 1999. | : | |

Petitioner, Hebrew Academy of Long Beach, 530 West Broadway, Long Beach, New York 11561, filed a petition for revision of a determination or for refund of real estate transfer tax under Article 31 of the Tax Law for the year 1999.

On March 15, 2001, the Division of Taxation filed a motion for an order granting summary determination and denying the petition. Petitioner filed no response to the motion. Accordingly, the 90-day period for the issuance of this determination began on April 14, 2001, 30 days from the date of filing of the motion. Petitioner appeared by Howard J. Kopel, Esq. The Division of Taxation appeared by Barbara G. Billet, Esq. (Margaret T. Neri, Esq., of counsel).

ISSUE

Whether the Division of Taxation properly denied petitioner's claim for refund of real estate transfer tax paid upon its acquisition of real property containing a residence in poor condition which it intended to demolish in order to erect a school building.

FINDINGS OF FACT

1. In the summer of 1999, petitioner, Hebrew Academy of Long Beach, purchased residential property, formerly known as the Lee Estate, located in the Five Towns community of Woodmere, Long Island, for \$2,300,000.00. Petitioner remitted \$23,000.00, which represented the 1% additional real estate transfer tax (the so-called “Mansion Tax”) due on the conveyance of residential real property for \$1 million or more, on its consideration paid of \$2,300,000.00. On its real estate transfer tax return dated July 23, 1999, petitioner noted that the property conveyed fit the category of “1-3 family house,” and that the “Percentage of real property conveyed which is residential real property” was 100%.

2. Petitioner filed a claim for refund dated October 27, 1999, which sought a refund of this 1% additional real estate transfer tax for the following reason:

[T]his property is not one which ‘is or may’ be used as a one family dwelling.

This Grantee purchased the property with the express, and sole purpose, of demolishing it, and replacing it with a new school building. We believe that the only reason that the property was available to us for such purpose was that no reasonable purchaser would consider its use as a one family dwelling.

This property was purchased, and will be used, solely for charitable and educational purposes. Imposition of mansion tax in respect of this property would, we respectfully maintain, be unjust and impose a difficult burden on an educational institution.

3. By a letter dated December 2, 1999, the Division of Taxation (“Division”) disallowed petitioner’s claim for refund and provided the following explanation, in relevant part, for its disallowance:

[T]he subject property did not change its character as residential real property upon its conveyance to Hebrew Academy, even if your intent was to demolish it and construct a school. The Tax Law does not provide an exemption from Mansion Tax for residential real property purchased for demolition. . . .

[Furthermore], it is the Department's position that . . . there are no requirements in the Tax law [sic] or in the regulations that the residential real property be habitable for the Mansion Tax to be properly imposed.

4. Petitioner's architect, Robin Guenther, in a letter dated October 22, 1999 to the attorney for the Hebrew Academy of Long Beach opined that for various reasons "It would require a significant investment to modernize [what he described as residential property] to make it reasonably habitable." The architect also suggested that "It is more likely that a purchaser of this property for residential use would demolish the structure and rebuild it entirely." According to the architect, the dwelling as of the date of the letter was vacant and "has been only partially occupied by a caretaker for many years."

CONCLUSIONS OF LAW

A. A motion for summary determination may be granted if, upon all the papers and proof submitted, the administrative law judge finds that it has been established sufficiently that no material and triable issue of fact is presented and that the administrative law judge can, therefore, as a matter of law, issue a determination in favor of any party (20 NYCRR 3000.9[b][1]). Here, petitioner did not respond to the Division's motion, and it is therefore deemed to have conceded that no question of fact exists which would require a hearing to resolve (*see, Kuehne & Nagel v. Baiden*, 36 NY2d 539, 544, 369 NYS2d 667, 671; *Costello v. Standard Metals*, 99 AD2d 227, 472 NYS2d 325, *appeal dismissed* 62 NY2d 942).

B. In 1989, a real estate transfer tax known as the "Mansion Tax" was enacted. This transfer tax was in addition to the real estate transfer tax imposed by Tax Law § 1402. The Mansion Tax, codified at Tax Law § 1402-a(a), provides as follows:

In addition to the tax imposed by [Tax Law § 1402], a tax is hereby imposed on each conveyance of residential real property or interest therein when the consideration for the entire conveyance is one million dollars or more. For

purposes of this section, residential real property shall include any premises that is or may be used in whole or in part as a personal residence, and shall include a one, two, or three-family house, an individual condominium unit, or a cooperative apartment unit.

The parties do not dispute the fact that the consideration for the conveyance of the former Lee Estate to petitioner was \$2,300,000.00 so that the \$1,000,000.00 threshold for imposition of the Mansion Tax was satisfied. Rather, petitioner contends that the Lee Estate should not be considered “residential real property” for purposes of this additional real estate transfer tax. However, the record on the Division’s motion includes evidence that clearly supports a conclusion that the property conveyed to petitioner was “residential real property.” First, petitioner itself, on its real estate transfer tax return dated July 23, 1999, categorized the property as 100% residential real property. In addition, although the estate was vacant as of October 22, 1999, the date of the letter of petitioner’s architect, the property, in the architect’s words, had been “partially occupied by a caretaker for many years.” Furthermore, the date of the architect’s letter was three months after the conveyance of the property to petitioner which suggests that, in fact, a caretaker may have been occupying the estate at or near the time of the conveyance.

C. As noted above, the Mansion Tax is imposed on the transfer of property which “is or *may* be used in whole or in part as a personal residence [emphasis added].” Consequently, petitioner’s argument that the estate should not be treated as residential real property because it is in terrible condition and would require much work to make it habitable is not relevant since the estate “may be used” as a personal residence if such work is performed. The fact that petitioner may have purchased the Lee Estate with the intention of demolishing the residence and constructing a school does not alter the fact that the property could have been used as a personal residence if petitioner’s intentions were such. The Lee Estate did not change its character as

residential real property *upon its conveyance* to petitioner, even if petitioner intended to use it for purposes of establishing a school at the site. At some future date there is, of course, the possibility that the character of the real property would be changed from residential real property to a school property. However, as of the date of its conveyance to petitioner, the property was properly viewed by the Division as residential real property subject to the imposition of the Mansion Tax because the consideration paid was in excess of the \$1,000,000.00 threshold.

D. Finally, petitioner has not shown that the conveyance at issue was eligible for any of the exemptions from the imposition of real estate transfer taxes including the Mansion Tax as provided for in Tax Law § 1405. Rather, petitioner, in effect, has attempted to claim an exemption that simply does not exist. Although there might be certain policy reasons favoring petitioner's position, it is for the Legislature and the Governor to consider such reasons since it would require a statutory amendment to expand the exemptions provided in the current law to cover the situation at issue. In sum, the Tax Law does not provide an exemption from the Mansion Tax for residential real property purchased by a nonprofit, religious organization for purposes of constructing a school.

E. The petition of Hebrew Academy of Long Beach is denied, and the disallowance of refund is sustained.

DATED: Troy, New York
June 21, 2001

/s/ Frank Barrie
ADMINISTRATIVE LAW JUDGE